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In The

Supreme Court of the United States

OCTOBER TERM, 1979
No. 79-1383

RICHARD A. GANT, *et al.*,

Petitioners,

v.

UNION BANK, *et al.*,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent Charles D. Prutzman, Jr., respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 10, 1979, filed herein on March 7, 1980.

Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit, reported at 609 F.2d 411 (1979), appears in the Appendix to the Petition at A-2.* The opinion of the United States District Court for the Southern District of California, reported at 75 F.R.D. 702 (1977), appears in the Appendix to the Petition at page A-48.

* Hereinafter citations to the opinion below will be given as "609 F.2d at ....., Petition at ....."

Jurisdiction

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 10, 1979, and the petition herein was filed within 90 days of that date. Petitioners have invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

Questions Presented

(1) Does the Seventh Amendment permit the striking of a jury demand in a civil case because of the perceived complexity of the issues and the nature of the evidence?

(2) Does the due process clause of the Fifth Amendment require the striking of a jury demand in a civil case because of the perceived complexity of the issues and the nature of the evidence?

Constitutional Provisions Involved

The Seventh Amendment of the United States Constitution provides, in relevant part, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be preserved. . . ."

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall be . . . deprived of . . . property, without due process of law. . . ."

Statement of the Case

The Statement of the Case presented in the Petition adequately describes the factual setting and the decision below, except in two important respects.

First, the Petition overstates the complexity of the litigation. While this consolidated action at one time consisted of five class actions and 13 non-class actions, with scores of defendants and numerous plaintiffs, settlements have significantly simplified the litigation. At the time the Ninth Circuit heard oral argument, only five cases were then actively litigated. *See* Supplemental Brief of Appellants Touche Ross & Co. and Union Bank, filed May 18, 1979, *In re U.S. Financial Securities Litigation,* 609 F.2d 411 (9th Cir. 1979). The other 13 cases either had been settled or were dormant at the time of the hearing. By the time the Petition was filed on March 7, 1980, all but one of the cases had been settled.[1] The one remaining case is *Colonial Ventures, Inc. & Colonial Equities, Inc. v. Touche Ross & Co.,* No. 74-436-T, R.3141, which is not a class action, but is brought by individual corporate plaintiffs under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R § 240.10b-5, promulgated thereunder, and state law.

The Petition's second deficiency in stating the case below lies in its interpretation of the Ninth Circuit's holding. The Court of Appeals' discussion of footnote 10 of this Court's opinion in *Ross v. Bernhard,* 396 U.S. 531 (1970), is not as broad as Petitioners assert. The Petition claims that the Ninth Circuit "held that . . . the three-pronged *Ross* test cannot be used as a means of determining the right to a jury trial. . . ." Petition at 5. In fact, the Ninth Circuit applied an "historic test," which included both the first and second parts of the *Ross* footnote, in deciding that the district court's order striking the jury demands violated the Seventh Amendment. 609 F.2d at 423, Petition at A-25-A-26. The court simply did not use the third, and most problematic, prong of that test, "the practical abilities and limitations of juries." *Id.* It "decline[d] the invitation to read the *Ross* footnote as establishing a new interpretation of the Seventh Amendment." 609 F.2d at 432, Petition at A-46.

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[1] As described in the Memorandum of Touche Ross & Co. in Opposition to the Petition, filed this date, since the time of the Ninth Circuit's hearing, the parties in three class actions have reached agreements on settlement, but the district court has not yet approved the settlements, and one private action has been settled.

Reasons for Denying the Writ

Petitioners have asked this Court to review a "fundamental" issue of Seventh Amendment jurisprudence. Petition at 7. But they request this Court to undertake that far-reaching inquiry when neither this case nor the developing case law justifies or requires such a review. In their haste to have this Court create a major and unprecedented exception to the Seventh Amendment, Petitioners have ignored the prudential considerations which guide this Court's decision to grant or deny a writ of *certiorari*.

First, changing circumstances have made this action an inappropriate vehicle for considering the "fundamental" issue raised in the Petition. The settlement of all but one of the consolidated cases has substantially altered the factual basis upon which the jury trial issue was originally decided. Moreover, Petitioners, who are all defendants below, seek this Court's review of an interlocutory order certified under 28 U.S.C. § 1292(b). If Petitioners prevail after a jury trial of the claims against them, their constitutional arguments would be moot.

Second, there is no conflict among courts of appeals regarding the issue presented. Petitioners request the Court to decide the jury trial issue after only one court of appeals has considered the issue. Moreover, cases pending before the United States Court of Appeals for the Second and Third Circuits, as well as another case pending before the United States Court of Appeals for the Ninth Circuit, may add further support to the decision below. Furthermore, Petitioners seek review before trial courts and counsel have had a sufficient opportunity to adopt innovative procedural tools both to preserve the jury trial right and to permit counsel to shape cases so that they can be understood by juries and judges.

Finally, the magnitude of the issue raised in the Petition must be placed in its proper perspective. The number of complex cases comprised less than 0.3% of all the civil cases

tried in 1979, and required less than 4% of all trial days for that year.[2] Petitioners seek to create an absolute exception to Seventh Amendment protections in order to respond to a recent development involving only a very small number of cases, before adopting other, less drastic means of ensuring that those cases are tried before a rational fact-finder.

1. This Action Is No Longer An Appropriate Vehicle For Considering The Constitutional Issues Raised By The Petition.

a. *Of the original 18 consolidated cases, only one action remains.*

The Petition posits a constitutional dilemma which, as a factual matter, no longer exists. The Petition assumes that there are civil cases in which "the complexity of the issues and evidence . . . is beyond the practical abilities and limitations of a jury. . . ."[3] Even if there are such cases, and even if this action were once such a case, the question is now purely hypothetical: there has been no showing that, after settlement of all but one of the constituent cases, the one remaining case is of such complexity. This Court has denied petitions for *certiorari* where changing circumstances have mooted the question posed. *Kremens v. Bartley*, 431 U.S. 119, 127 (1977); *Craig v. Boren*, 429 U.S. 190, 192 (1976); *Indiana Employment Security Division v. Burney*, 409 U.S. 540, 541-42 (1973) (*per curiam*). This is one such case.

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[2] Administrative Office of the United States Courts, *Annual Report of the Director*, Tables C-8, C-9 at A-38-39, 39-b (1979).

[3] One of the principal defects of the question presented is that it contains no workable standards for determining what cases are too complex. Although *amicus* International Business Machines Corp. suggests various standards, Brief of Amicus Curiae International Business Machines Corp. at 11, it does not suggest how courts should weigh those considerations. It is likely that use of those standards will result in yet more time-consuming appeals from disappointed litigants arguing that the trial court abused its discretion in either striking, or failing to strike, jury demands.

The Petition states that five class actions and 13 non-class actions were consolidated to comprise *In re U.S. Financial Securities Litigation.* Petition at 3. At this time, however, only one lawsuit is active, *Colonial Ventures, Inc. and Colonial Equities, Inc. v. Touche Ross & Co., et al., supra.* Each of the other active actions has been settled. While the Petitioners acknowledge that "many" of the consolidated cases have been settled, they continue to maintain that the overwhelming complexity of the remaining action has not been simplified by those settlements. Petition at 5 n.2. Contrary to Petitioners' assumptions, there was no finding, either by the district court, or by the Ninth Circuit, that the one remaining case is beyond the capacity of a jury. Therefore, there is no basis for finding this case to be sufficiently complex to warrant this Court's review of the Court of Appeals' opinion that the district court erred in striking the jury demands.[4]

b. *Petitioners' constitutional claims arise from an interlocutory appeal and may be rendered moot after a jury trial.*

Not only is there doubt regarding the complexity of the remaining action, but Petitioners, who are defendants below, are prematurely raising their due process argument. There has been no trial of the claims against them. At the time of the district court's order, the Ninth Circuit had never ruled on the jury trial issue. It was therefore appropriate for that Court to undertake interlocutory review of an issue of fundamental importance arising from the then-imminent trial of 18 consolidated cases. However, now that the Ninth Circuit has reviewed the district court's order, and the 18 cases have dwindled to one, there is no pressing need for this Court's review of the decision below.

If after trial, Petitioners are aggrieved by a jury verdict, they have a full panoply of remedies, such as a motion for judgment notwithstanding the verdict, to review the verdict. If Petitioners prevail before a jury, there will obviously be no need to address the constitutional issues raised in this case.

[4] *See* Memorandum of Touche Ross & Co. in Opposition to the Petition for a fuller explanation of the various settlements.

2. The Jury Trial Issue Has Not Been Sufficiently Considered By The Courts Of Appeals.

a. *There is no conflict among the courts of appeals.*

Petitioners assume what they must prove, that some cases are so complex that they are beyond the practical abilities and limitations of a jury. They then ask the abstract question of whether, in a case in which the claims made and relief sought are legal, but the action is "complex," the Seventh Amendment permits, or due process demands, the striking of the jury. There is no present conflict among the courts of appeals regarding that issue and only one appellate court, the Ninth Circuit, has considered the question.[5]

Four district courts, other than the one below, have struck jury demands in complex cases, while other district courts have refused to do so; but this Court does not typically resolve differences among district courts. *See* Sup. Ct. R. 19. Moreover, two of those four cases arose within the Ninth Circuit. The precedential value of one, *In re Boise Cascade Securities Litigation,* 420 F.Supp. 99 (W.D. Wash. 1976), has been erased by the decision below. The other is presently on appeal. *ILC Peripherals Leasing Corp. v. IBM Corp.,* 458 F.Supp. 423 (N.D. Cal. 1978), *appeal pending sub nom. Memorex Corp. v.*

[5] Petitioners assert that the decision below creates a conflict among the circuits regarding the applicability of footnote 10 of *Ross v. Bernhard, supra.* Petition at 12-14. There is no such conflict. That footnote indicated that this Court believed three considerations determined whether there was a right to a jury trial: pre-merger custom, the nature of the relief sought and the practical abilities and limitations of juries. Petitioners argue that the third prong swallows the first two. But only one of the court of appeals' opinions cited in the Petition supports striking a jury demand, and that case did not rely solely upon the complexity ground. *Hyde Properties, Inc. v. McCoy,* 507 F.2d 301, 306-07 (6th Cir. 1974). To the contrary, the court in *Hyde Properties* found that the nature of the relief sought also militated in favor of dispensing with a jury. Thus, the cases cited to show a conflict are not inconsistent with the opinion below.

IBM Corp., No. 78-3050, 78-3236 (9th Cir., docketed Sept. 12 and Oct. 6, 1978). The other two district court cases, one of which is presently on appeal, arose within the Second Circuit.

There are three cases pending in the courts of appeals, which could in fact lead to a consensus among those courts, obviating the need for this Court to reconcile their decisions. The Second Circuit presently has before it *Rosen v. Dick*, 83 F.R.D. 540 (S.D.N.Y. 1979), *interlocutory appeal docketed*, No. 79-7844 (2d Cir. Dec. 6, 1979), a case in which the district court found that the right to a jury trial had been waived, and refused to empanel a jury for an advisory opinion because of the complexity of the action. In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 478 F.Supp. 889 (E.D. Pa. 1979), *interlocutory appeal docketed*, No. 79-2540 (3d Cir. Sept. 20, 1979) (argued Feb. 14, 1980), Judge Becker issued a carefully reasoned opinion which upheld a jury demand in a complex antitrust action. The Third Circuit is now reviewing that decision. Finally, the Ninth Circuit has before it *Memorex Corp. v. IBM Corp., supra*, a case in which the district court struck the jury demand, following a deadlock among the jury.

Because Petitioners' arguments are both novel and unprecedented, courts of appeals should be given an opportunity to examine them. Except for the mention of jurors' "limitations" in the *Ross* footnote, this Court has never considered complexity as a factor in favor of striking a jury demand. *See* cases cited at 609 F.2d at 426 n.48, Petition at A-32 n.48. Despite the attractiveness of Petitioners' proposal for promoting judicial adminstration by giving courts the discretion to strike jury demands in complicated cases, it is nevertheless repugnant to the Seventh Amendment. And the difficulties which inhere in the proposal to give courts discretion over whether to empanel a jury in complicated litigation override any attraction: the unrestrained discretion it gives judges; the potential for dilatory motions; the uncertainty about which issues and cases are and which are not inordinately "complex"; the abrupt departure from this Court's well-developed historical analysis.

b. *Procedural innovations to adapt trial by jury to complex cases should be tried before eliminating jury trials altogether in such cases.*

The genius of our judicial system has been its ability to adapt the institution of the jury to meet changing needs. *E.g., Colgrove v. Battin*, 413 U.S. 149, 156-57 (1973) (twelve member jury not required by Seventh Amendment); *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931) (new trial on less than all issues may be ordered, although common law did not permit setting verdict aside in part).

In the opinion below, the Ninth Circuit stressed the availability of numerous procedural devices, such as stipulating to evidence or facts, separate trials of specified issues, the appointment of a master, and the use of summaries, as a way of reconciling the Seventh Amendment's command with the presumed limitations of juries. 609 F.2d at 427-29, Petition at A-35-A-38. Indeed, the brief of *amicus curiae* International Business Machines Corporation suggests other "novel modifications of traditional jury trial procedures" that trial courts might use to reconcile these two competing interests. Brief of Amicus Curiae International Business Machines Corporation at 9-11. *See also Zenith Radio Corp. v. Matsushita Electric Industrial Co. supra*, 478 F.Supp. at 936.

The innovations suggested by the Court below, and by various commentators, *e.g.*, Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 Stan. L. Rev. 99, 115-18 (1979), have not yet been implemented. There is, therefore, insufficient practical experience to conclude that juries and jury trials have the inherent disabilities ascribed to them by Petitioners and *amicus curiae*.[6] This Court's review of the jury trial

[6]In view of the evolving techniques being used by district courts in large cases and the lack of conflict among courts of appeals, the issue is not ripe, in a practical sense, for this Court's review. *See Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102, 138 (1974), *citing Ashwander v. TVA*, 297 U.S. 288, 346-47 (1938) (Brandeis, J. concurring) and *Poe v. Ullman*, 367 U.S. 497 (1961).

issue should follow, not precede, efforts by trial courts to tailor the institution of the jury to the demands of modern litigation. Indeed, a premature decision in this case could end such productive experimentation, which may eventually diminish the calls for a "complex litigation" exception to the Seventh Amendment.

Petitioners challenge two hundred years of Seventh Amendment jurisprudence for the assumed benefit of litigants in a narrow category of cases. Significantly, all of the district court decisions striking jury trial demands because of perceived complexity have been made in the past four years. *See* Petition at 10-11. They present no empirical evidence to show that as a general matter juries are incapable of rationally deciding complex issues. Since the Federal courts have not had time to adopt the wide range of procedural tools available to make difficult cases more understandable to jurors, it would be premature to consider the questions raised in the Petition.

Conclusion

For the reasons stated above, Respondent Charles D. Prutzman, Jr., respectfully requests this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: April 7, 1980.

Respectfully submitted,

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